STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 22, 2010
v	No. 288442 Jackson Circuit Court
JAKE WILLIAM JEWELL, Defendant-Appellant.	LC No. 07-004839-FH

Before: SAAD, P.J., and HOEKSTRA and MURRAY, JJ.

PER CURIAM.

I. FACTS AND PROCEEDINGS

Defendant was originally tried for three felonies, larceny of a firearm, MCL 750.357b; felon in possession of a firearm, MCL 750.224f; and possession of a firearm during the commission of a felony, MCL 750.227b. He was also tried for two misdemeanors, breaking and entering of a motor vehicle to steal property worth more than $200 but less than $1,000, MCL 750.356a(2)(b)(i); and larceny of more than $200 but less than $1,000, MCL 750.356(4)(a). All these charges stem from a theft of $160, a 22-caliber revolver, and a hunting knife from William Kesterson's truck on December 4, 2007. On February 27, 2008, the jury convicted defendant of the misdemeanors; however, the jury did not reach a verdict on the felonies. Defendant was subsequently retried on the felonies. On August 15, 2008, following the second jury trial, defendant was convicted of felon-in-possession, but acquitted of the other felonies. Defendant was sentenced to 34 to 120 months' imprisonment for his felony conviction, and to 210 days in jail for each of his misdemeanor convictions.

Defendant appeals and we affirm.

II. SUFFICIENCY OF THE EVIDENCE

Defendant appeals on the ground of sufficiency of the evidence, and advances a vague challenge to the identity element, as well as a challenge to the possession element of his felon-in-possession conviction in the context of an aiding and abetting theory. We review sufficiency of the evidence claims de novo, viewing the evidence in the light most favorable to the prosecution

to determine if the evidence was sufficient for a rational jury to find the defendant guilty beyond a reasonable doubt. *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005).

Identity is an element of every offense. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). "Identity may be shown by either direct testimony or circumstantial evidence." *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967). Here, William's son, Michael Kesterson, observed an individual fleeing from his property into an adjacent wooded area. Michael called his neighbor, Bruce Hildenbrand, and provided a description of the individual and told him that the individual was heading towards the nearby mobile home park. Hildenbrand observed an individual, who matched the suspect's description, walking down a nearby road and approaching a residence. At trial, Hildenbrand identified the suspect as defendant. The police subsequently arrested defendant, and located William's knife and a pair of binoculars inside an inoperable car in front of the residence where defendant had been hiding. Trial testimony established that these binoculars belonged to defendant. The police also located defendant's Blackberry clipped to some brush near Michael's property. A track by the police canine unit led the police into the wooded area adjacent to Michael's property and to the mobile home park, where defendant resided. We defer to the jury's credibility decisions regarding witness identification testimony, *People v Edwards*, 55 Mich App 256, 259-260; 222 NW2d 203 (1974), and resolve conflicts regarding the evidence in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Ultimately, we will not interfere with the jury's role of determining the credibility of witnesses or the weight of the evidence, *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005), and we find that there is sufficient circumstantial evidence to establish defendant's identity as the robber. *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999); *Kern, supra* at 409-410.

The elements of felon-in-possession are that: (1) defendant possessed a firearm, (2) defendant had been convicted of a prior specified felony, and (3) less than five years had elapsed since defendant was discharged from parole for the previous felony. MCL 750.224f. The latter two elements are not disputed. "The term 'possession' includes both actual and constructive possession . . . a person has constructive possession if there is proximity to the article together with indicia of control." *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000), quoting *People v Hill*, 433 Mich 464, 470-471; 446 NW2d 140 (1989) (citation omitted). "Possession may be proven by circumstantial as well as direct evidence." *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550 (2000).

The only evidence regarding the firearm was William's testimony that he always kept a handgun with him in an old shaving kit, and that he left the kit with the handgun therein in his truck on the day in question. He testified that his handgun was one of the items missing from the truck. There was a great deal of circumstantial evidence that defendant stole the items from the truck. He matched the description of the suspect observed fleeing from Michael's property, his Blackberry was located near Michael's property, he was located in the vicinity of Michael's property shortly after the incident occurred, and William's knife was recovered at the scene where the police arrested defendant. The jury could have accepted or rejected the circumstantial evidence that defendant stole William's items, and, as such, that he was in actual possession of a firearm in violation of MCL 750.224f. *Burgenmeyer, supra* at 438. See also *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003) ("Circumstantial evidence and reasonable inferences that arise from the evidence can constitute sufficient proof of the elements of the crime."). And,

in fact, the jury convicted defendant of this offense. We will not interfere with the jury's role of determining the credibility of witnesses or the weight of the evidence. *Williams, supra* at 419. Importantly, we note that the fact that the jury acquitted defendant of the other felonies has no bearing on whether the jury found him guilty of felon in possession. See *People v Torres*, 452 Mich 43, 75; 549 NW2d 540 (1996) (a jury in a criminal case may reach an inconsistent verdict as part of its power of leniency). We affirm defendant's conviction.

In doing so, we acknowledge that defendant argues that there was insufficient evidence to establish the possession element under an aiding and abetting theory. However, there is no record support that the jury convicted defendant of felon in possession under such a theory. The trial court only provided an aider and abettor instruction in conjunction with the charge of larceny of a firearm, and not with the felon-in-possession or felony-firearm charges. Jurors are presumed to follow a trial court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found that the prosecution established the element of possession beyond a reasonable doubt. *McGhee, supra* at 622. Because we reach this conclusion, we need not address defendant's challenge to the possession element in the context of an aiding and abetting theory.

We note that defendant does not expressly challenge the sufficiency of the evidence of his misdemeanor convictions on appeal.[1] "The failure to brief the merits of an allegation of error constitutes an abandonment of the issue." *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004). Viewing the evidence in the light most favorable to the prosecution, we find that a rational jury could find beyond a reasonable doubt that the prosecution established all of the elements of the aforementioned misdemeanors. *McGhee, supra* at 622.

III. DUE PROCESS

Defendant says that the trial judge denied his constitutional right to due process by allowing him to be kept in shackles visible to the jury for the duration of jury selection and preliminary instruction. Unpreserved allegations of error are reviewed for plain error affecting the defendant's substantial rights. *Carines, supra* at 764-765.

Generally, a criminal defendant has the right to be free of shackles or handcuffs in the courtroom. *People v Payne*, 285 Mich App 181, 186; 774 NW2d 714 (2009). Here, before the jury pool entered at the beginning of the trial, defense counsel informed the trial court that defendant was still in shackles and leg irons. The trial court responded: "I can hardly see them

[1] The elements of breaking and entering of a motor vehicle to steal property worth more than $200 but less than $1,000 are: (1) entering or breaking a motor vehicle, (2) stealing or unlawfully removing property, and (3) such property is worth more than $200 but less than $1,000. MCL 750.356a(2)(b)(i). The elements of larceny of more than $200 but less than $1,000 are: (1) committing larceny by stealing property, and (2) and such property is worth more than $200 but less than $1,000. MCL 750.356(4)(a).

from where you're sitting. [Defense counsel], go over to that jury box over there." The record reflects that defense counsel made no further inquiry about shackles until after the jury was selected. Defense counsel then asserted: "Your Honor, I would like to make one more request with respect to my client's shackles. You can see them from the jury box and I would just like to bring it to the attention of the Court and ask you to make a ruling relative to that." The trial court granted the request, and defendant was unshackled. Defendant should not be permitted to take advantage of an alleged error that could have been addressed before jury selection commenced, and that defense counsel only sought to revisit after the jury had been selected. See *People v Breeding*, 284 Mich App 471, 486; 772 NW2d 810 (2009) ("A defendant should not be allowed to assign error to something that his own counsel deemed proper."). "To do so would allow a defendant to harbor error as an appellate parachute." *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998). Further, because the record does not indicate that any member of the jury actually saw the defendant in leg irons and because the trial court was not requested to give a cautionary instruction, we find no error requiring reversal. *People v Marsh*, 108 Mich App 659, 678; 311 NW2d 130 (1981).

V. CREDIT FOR TIME SERVED

Also, defendant contends that the trial court improperly denied him credit for time served in jail pending his trial and sentencing. Defendant says this denial deprived him of certain constitutional protections. This issue is waived. Defendant moved the trial court for resentencing, asserting that he was entitled to credit 297 days for time served in jail pending trial. However, the parties subsequently entered into a stipulation, which denied defendant's request for credit for time served. Waiver is the intentional relinquishment of a known right. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Where an issue is waived, appellant may not seek appellate review of the claimed error because his waiver extinguished any error. *Id.*

Defendant further contends that he is entitled to credit on his misdemeanor sentences, because the consecutive sentencing mandate of MCL 768.7a(2) does not apply to new misdemeanor convictions. Defendant waived this issue by stipulating to the order dismissing his motion for resentencing, thereby precluding appellate review. *Carter*, *supra* at 215.

Affirmed.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray